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U.S. EPA REGION 5
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A Joint Letter from Six Bands of the Anishinaabeg Territory Watersheds and Waters of Lake Superior: Bad River Band of Lake Superior, Red Cliff Band of Lake Superior, Lac du Flambeau Band, St. Croix Band, Sokoagon Band, Lac Courte Oreilles Band.

May 27, 2014

Gina McCarthy
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Susan Hedman
U.S. Environmental Protection Agency, Region 5
Ralph Metcalfe Federal Building
77 West Jackson Blvd.
Chicago, IL 60604

Tribes' request that Environmental Protection Agency initiate a public process under Section 404(c) of the Clean Water Act to protect treaty rights, aquatic resources, fisheries, wildlife, subsistence and public uses in the Bad River Watershed and western Lake Superior Basin from metallic mining, including a potential Gogebic Taconite mine.

Dear Administrator McCarthy and Dr. Hedman:

The undersigned tribal councils represent federally-recognized tribes from the lands presently known as the State of Wisconsin, who retained rights in territories ceded by the Treaty of 1837, 7 Stat. 536, and the Treaty of 1842, 7 Stat. 591, and reserved rights to homelands in the Treaty of 1854, 10 Stats. 1109, with the United States of America as recognized in *Lac Courte Oreilles v. Voigt*, 700 F.2d 341 (7th Cir. 1983), and who enjoy long-standing government-to-government relations with the federal government. We are signing this letter because the United States has a responsibility to protect the rights and resources reserved by the Treaties and responsibility to implement its authorities to protect such resources where it has the discretion to

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do so¹. It is with that understanding that we request that the Environmental Protection Agency (EPA) initiate a public process under section 404(c) of the Clean Water Act (CWA).²

As you are each undoubtedly aware, CWA§404(c) authorizes the EPA to restrict, prohibit, deny, or withdraw the use of an area for the disposal of dredged or fill material, including mining wastes, when it is determined that discharge will have unacceptable adverse effects on fisheries, wildlife, shellfish beds, municipal water supplies, or recreational areas.³ While the public process and consultation with our Anishinaabeg relations around Lake Superior may identify risks to other such aquatic resources of national importance,⁴ we state with confidence and authority that all of these resource types would be adversely impacted by the proposed Gogebic Taconite mine in the headwaters of the Bad River Watershed. Furthermore, the actions of the mining company and the Wisconsin's regulatory process—which we shall detail below—leave us with little assurance that science and law will be wielded in a transparent and just manner to protect our lands and waters. As a foundation for that discussion, we will begin by describing the resources and practices potentially at risk within the Bad River Watershed.

The Bad River Watershed drains approximately 1000 square miles of highland forest, wetlands, and coldwater streams.⁵ An indication of the high quality of the natural resources of this basin is reflected in the abundance of federal, state and tribally protected natural areas. These include the Chequamegon-Nicolet National Forest, Rainbow Lake Wilderness Area, Porcupine Lake Wilderness Area, Copper Falls State Park, Bibon Swamp State Natural Area, and the internationally-recognized Kakagon-Bad River Sloughs Estuary Complex.⁶ All of the

¹ This responsibility was acknowledged by Deputy Administrator Perciasepe in his January 8, 2013 memorandum regarding Western Washington Tribal Treaty Rights based, in part, on Article VI of the U.S. Constitution stating that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land.”

² 40 CFR 231.1(a) states that “The Administrator may also prohibit the specification of a site under section 404(c) with regard to any existing or potential disposal site *before* a permit application has been submitted to or approved by the Corps or a state” (*emphasis added*).

³ 33 USC § 1344.

⁴ The 1992 Memorandum of Agreement between the EPA and Army Corps of Engineers specifies that EPA may elevate disputes over individual permit cases when an action “will result in unacceptable adverse effects to aquatic resources of national importance.” EPA Region 5 has designated rivers, streams, wetlands, and fens as aquatic resources of national importance.

⁵ A map depicting the watershed and key resources is available at: http://www.badriver-nsn.gov/images/stories/docs/MiningUpdate/PenokeeOreBody_LargeOverview_350dpi_Reduced.jpg.

⁶ The site was designated as the 31st wetland of international importance in the United States under the RAMSAR Convention in September 2012. More information is available at:

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waters originating in the watershed eventually flow into the Bad River Reservation, join the Bad River, and journey through the Kakagon-Bad River Sloughs on their way to Lake Superior and the Apostle Islands National Park.⁷ The watershed hosts critical habitat for migratory birds (including the Trumpeter Swan and federally-listed Piping Plover),^{8,9} headwater streams replete with native trout,¹⁰ one of two U.S. rivers in the Lake Superior basin hosting self-sustaining Lake Sturgeon populations,¹¹ a regionally-significant freshwater mussel bed, and the largest natural wild rice beds in the Great Lakes.¹² It was this abundance of wild rice which signaled to our ancestors, and each subsequent generation, that this is our home. The wild rice and its relationship to the Bad River Watershed is the embodiment of our people's covenant with the Creator, our nation's "breadbasket", and it is at risk.

In 2011, Gogebic Taconite, a subsidiary of Cline Resources and Development, purchased an option to lease mineral rights in a 22-mile ridgeline in the headwaters of the Bad River Watershed approximately 6 miles south of the Bad River Reservation and upstream in the headwaters of the Bad River. Since that time, Gogebic Taconite has successfully lobbied for its own ferrous mining law and legislation to close otherwise publically accessible lands, threatened independent scientists with criminal prosecution, denied clear evidence of sulfide and amphibole minerals, and submitted a notice of intent to mine a 4.5-mile long open-pit; which they have called "Phase I."¹³ A project of this scale is unprecedented in Wisconsin.

http://www.ramsar.org/cda/en/ramsar-news-archives-2012-kakagon/main/ramsar/1-26-45-520%5E25648_4000_0__.

⁷ In 1963, President John F. Kennedy recognized the value of these resources, remarking that "Lake Superior, the Apostle Islands, the Bad River area, are all unique. They are worth improving for the benefit of sportsmen and tourists... These islands are part of our American heritage. In a very real sense they tell the story of the development of this country. The vast marshes of the Bad River are a rich resource providing a home for a tremendous number, and varied number, of wild animals."

⁸ Wisconsin Bird Conservation Initiative. Kakagon-Bad River Wetlands-Forest Corridor. Wisconsin Important Bird Areas. Available at: <http://www.wisconsinbirds.org/iba/sites/kakagonbadriver.htm>.

⁹ Great Lakes Waterbird Research Program. 2009. Piping Plovers. University of Minnesota. Available at: http://www.waterbirds.umn.edu/Piping_Plovers/piping1.htm.

¹⁰ Wisconsin Department of Natural Resources. 2014. Trout streams-Ashland County. Available at: http://dnr.wi.gov/topic/fishing/documents/trout/trout_maps/Ashland_color_portrait.pdf.

¹¹ Schloesser, J. and H. Quinlan. 2010. Status of the 2010 lake sturgeon spawning population in the Bad and White rivers, Wisconsin. U.S. Fish and Wildlife Service, Ashland Fish and Wildlife Conservation Office, Technical Report No. 1. Ashland, WI. 27pgs.

¹² EPA. 2009. Final Findings of Fact: Bad River Band Treatment as State under Clean Water Act §303c and 401. 30pgs.

¹³ See Gogebic Taconite Preapplication Notice to Wisconsin DNR on June 17, 2013. Available at: <http://dnr.wi.gov/topic/mines/gogebic.html>.

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If this project is developed, millions of tons of waste rock and tailings would be deposited in the water-rich headwaters of the Bad River Watershed. This would sacrifice the natural capital and ecosystem services critical to a healthy watershed. Fill deposit and pit dewatering activities are likely to disrupt the flow regimes and thermal refugia for cold-water fisheries. Mobilized metals, such as copper and iron, would further impair the fitness of native salmonids and other aquatic life.^{14,15} The loss of wetlands, clearing of land, and creation of an impermeable summit of waste in critical upper watershed locations could change flow patterns, exacerbate erosion, and deposit sediments down to the Kakagon-Bad River Sloughs Estuary Complex at the confluence with Lake Superior. Flashy, sediment-laden waters are known to impair fish recruitment, mobilize adsorbed metals, and disrupt wild rice production. In addition, the geology of the ore body and its potential overburden are known to host sulfide minerals.¹⁶ When exposed to air and water, sulfide minerals produce sulfate which has impaired wild rice fitness in vast reaches of Minnesota's Iron Range.¹⁷ This cannot be allowed to happen to Bad River's sloughs, the largest extant beds of wild rice in the Great Lakes region and cultural cornerstone of our people.

Regrettably, we cannot rely on the Wisconsin regulatory process to protect these critical resources and the many lifeways for which they provide. First, Wisconsin's new ferrous mining law¹⁸ presumes, at the outset, that significant adverse impacts to wetlands, from acts such as the

¹⁴ Hansen, J.A.; Lipton, J.; Welsh, P.G.; Morris, J.; Cacela, D.; and Suedkamp, M.J. 2002. Relationships Between Exposure Duration, Tissue Residues, Growth, and Mortality in Rainbow Trout (*Oncorhynchus mykiss*) Juveniles Sub-chronically Exposed to Copper. *Aquatic Toxicology* 58:174-188.

¹⁵ Payne, J.F.; B. French, D. Hamoutene, P. Yeats, A. Rahimtula, D. Scruton, and C. Andrews. 2001. Are metal mining effluent regulations adequate: identification of a novel bleached fish syndrome in association with iron-ore mining effluents in Labrador Newfoundland. *Aquatic Toxicology* 52: 311-317.

¹⁶ Pyritic shale is identified as being present within the ironwood iron formation and the overlying Tyler Formation in: Cannon, W.F.; LaBerge, G.L.; Klasner, J.S.; and Shulz, K.J. 2008. The Gogebic Iron Range – A Sample of the Northern Margin of the Penokean Fold and Thrust Belt. US Geological Survey Professional Paper 1730.

¹⁷ MPCA, Minnesota Pollution Control Agency. 2014. Wild rice sulfate standard study preliminary analysis. 22pgs. Available at: <http://www.pca.state.mn.us/index.php/view-document.html?gid=20743>.

¹⁸ 2013 WI Act 1 went into effect in March 2013 and was directly incorporated into NR 295 of the Wisconsin administrative code.

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disposal of mine waste, are necessary.¹⁹ The law requires the Wisconsin Department of Natural Resources to allow wetlands to be filled, even the most significant wetlands, as long as mitigation occurs somewhere in the ceded territories.²⁰ Second, the ferrous mining law limits the review of practicable alternatives to the site of the discharge.²¹ This eliminates any meaningful assessment of less damaging, upland alternatives. Third, the law enables groundwater standards to be altered to ensure compliance,²² permits exemptions for any State approval,²³ and requires the Wisconsin Department of Natural Resources to find that applicable water quality standards will be met if impacts are practicably avoided and mitigated.²⁴ Finally, the law removes the broad authority previously held by the Wisconsin Department of Natural Resources to take action against possible violations of statutes regulating discharges to wetlands and require responsible parties to act in manner protective of the public interest.²⁵ These wetland regulatory

¹⁹ 2013 WI Act 1 superseded the standard rule-making process by the Department of Natural Resources and legislated regulations for the review of ferrous mining projects. The legislative findings for 2013 WI Act 1 included that "the use of wetlands for bulk sampling and mining activities, including the disposal or storage of mining wastes or materials, or the use of other lands for mining activities that would have a significant adverse impact on wetlands, is presumed to be necessary." (NR 295.40(7), Wisc. admin code).

²⁰ NR 295.60(8)(e), Wisc admin code.

²¹ "The department shall limit its review to those practicable alternatives that are located at the site of the discharge or other activity and that are located adjacent to that site if the applicant has demonstrated that the proposed project causing the discharge or other activity will result in a demonstrable economic public benefit." (NR 295.60(4)(b), Wisc. admin code).

²² "When issuing or modifying a mining permit or issuing or reissuing any other approval, the department may grant an exemption from a groundwater quality standard and establish an alternative concentration limit to a groundwater quality standard." (NR 295.645(8), Wisc admin code).

²³ "The department may grant an exemption, as provided in this section, from any of the requirements of this subchapter applicable to any of the following:

(a) A mining permit application, including the mining plan, reclamation plan, and mining waste site feasibility study and plan of operation.

(b) A mining permit.

(c) Any other approval." (NR 295.56(1), Wisc admin code).

²⁴ "if significant adverse impacts to wetland functional values will remain after the adverse impacts have been avoided and minimized to the extent practicable, the department may not deny the permit on the basis of the impacts from the activity on wetlands if the department determines that the remaining impacts will be compensated for under a mitigation program under sub. (8)." (NR 295.60(6)(d), Wisc admin code).

²⁵ The January 2013 memorandum on the then proposed LRB 0762/1 ("the bill" or 2013 WI Act 1) by the Wisconsin Legislative Council states that "Under *current law*, the DNR has broad authority to proceed against possible violations of the statutes regulating discharges into wetlands for which the DNR determines that the public interest may not be adequately served by imposition of a penalty or forfeiture. Such a proceeding may result in an order directing the

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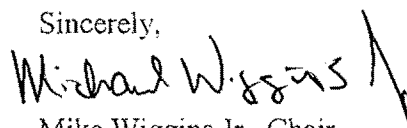
concerns are analogous to the 75 omissions or deviations EPA identified in Wisconsin's administration of the National Pollution Discharge Elimination System (NPDES) program.²⁶ The state's regulatory review process is at odds with that required under the Clean Water Act, and at odds with their obligation to coordinate their activities with tribal governments. This letter does not represent a comprehensive summary of our concerns with the Wisconsin regulatory process, which was amended in 2013 with the passage of the ferrous mining law—absent meaningful consultation with any Wisconsin Chippewa Tribe. But, even this abbreviated review demonstrates that the current regulatory process has significant impairments and, in our opinion, these infirmities render waiting for the costly environmental impact statement process impractical.

Therefore, we are formally requesting that you initiate a public process under Section 404(c) of the Clean Water Act to protect our treaty rights; as well as the aquatic resources, fisheries, wildlife, subsistence and public uses in the Bad River Watershed from metallic mining, including a potential Gogebic Taconite mine. Such a request is not unprecedented and is well within your authority.

We also invite you to visit us, to see the Penokee Hills, the Bad River Sloughs, and the big water of Lake Superior. See with your own eyes why generations have called these places home and generations will continue to fight for their protection.

This is not the first time we have raised this issue with the EPA and not the last time you will receive formal correspondence on the issue. We thank you, in advance, for your attention to this matter and look forward to hearing from you.

Sincerely,



Mike Wiggins Jr., Chair
Bad River Band of Lake Superior Chippewa

responsible parties to perform or refrain from performing acts in order to fully protect the public interest. This type of order may be civilly enforced. [s. 30.03 (4), Stats.] *The bill does not provide this authority to the DNR for wetlands activities related to ferrous mining.* (emphasis in original).

²⁶ See Dr. Hedman's letter to Secretary Stepp on July 18, 2011 regarding the legal authority for Wisconsin's administration of the NPDES approved program. Enclosure 1 of that letter lists the 75 omissions in the Wisconsin NPDES program in detail.

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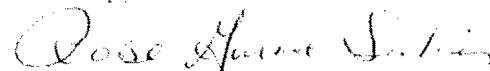
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Rose Gurnoe Soulier, Chair
Red Cliff Band of Lake Superior

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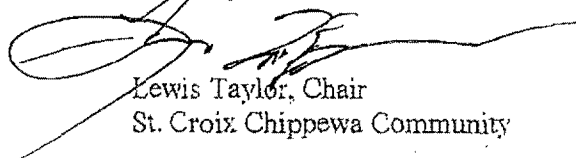
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Lewis Taylor, Chair
St. Croix Chippewa Community

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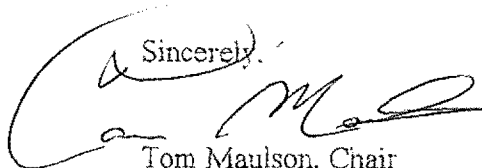
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Tom Maulson, Chair
 Lac du Flambeau Band of Lake Superior

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Chris McGeshick, Chair
Sokaogon Chippewa Community

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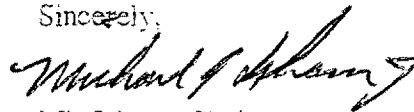
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Mic Isham, Chair
Lac Courte Band of Lake Superior

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